

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RICHARD D. WOLTKAMP

Claimant

VS.

CITY OF TOPEKA

Respondent

Self-Insured

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Docket No. 264,389

ORDER

Claimant appeals the February 16, 2004 Award of Administrative Law Judge Brad E. Avery. Claimant was denied benefits after the Administrative Law Judge (ALJ) determined that claimant had failed to file a timely application for hearing for the April 1, 1997 accidental injury. The ALJ, finding that that ruling was dispositive of the claim, determined none of the other issues. The Appeals Board (Board) heard oral argument on August 24, 2004.

APPEARANCES

Claimant appeared by his attorney, Seth G. Valerius of Topeka, Kansas. Respondent, a qualified self-insured, appeared by its attorney, Jeff K. Cooper of Topeka, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

ISSUES

- (1) Did claimant suffer accidental injury on April 1, 1997?

- (2) Did that accidental injury arise out of and in the course of his employment with respondent?
- (3) Did claimant suffer accidental injury through a series of accidents beginning April 1, 1997, and continuing thereafter?
- (4) Did those accidental injuries arise out of and in the course of his employment?
- (5) Was claimant advised by respondent that medical care had been terminated and no extensions would be allowed for the filing of claimant's application for hearing?
- (6) Did respondent promise to provide medical care in the future and, if so, did claimant act upon that promise such that equitable estoppel should delay the start of the running of the statute of limitations in this matter?
- (7) Is claimant entitled to future medical care?
- (8) Did claimant file a timely application for hearing?
- (9) What is the nature and extent of claimant's injury?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the Administrative Law Judge should be affirmed.

Claimant, a firefighter for respondent since 1981, alleges accidental injury on April 1, 1997, and a continuing series of accidents thereafter. On April 1, 1997, claimant testified he was putting on an air pack protection device, which weighs between 40 and 45 pounds. While putting on the device, claimant twisted his neck and bumped his head on the pack. That evening and into the next morning, claimant began noticing symptoms in his neck. Claimant advised his supervisor of the problem and injury. Claimant was instructed to keep an eye on the situation. The day after the incident, claimant went on vacation to Las Vegas, Nevada. Claimant testified that even though he was in Las Vegas to gamble, he was in bed for the first two days of his vacation and then returned to Topeka to seek medical care.

Claimant testified he first sought treatment with board certified physical medicine and rehabilitation specialist Joseph G. Sankoorikal, M.D. Dr. Sankoorikal testified he

examined claimant on April 11, 1997, with reports from claimant that he began having difficulties with his neck and back while on vacation. Dr. Sankoorikal testified that claimant told him that claimant developed numbness and an achy feeling in his left arm. Dr. Sankoorikal confirmed that claimant had congenital spinal stenosis and degenerative disc disease, which were longstanding conditions. Dr. Sankoorikal had been treating claimant for low back complaints since March 1, 1993, and for cervical complaints since August 2, 1993. An MRI done in 1997 indicated spinal canal stenosis and focal herniation at C4-5. An MRI done in 1993 showed narrowness of the C4-5 and C5-6 levels, although there was no herniation at that time. Dr. Sankoorikal was asked whether claimant's ongoing problems were the result of work activities or recreational activities. He stated that it was possible that claimant's firefighting activities could have caused the cervical condition to worsen, but was not able to say so within a reasonable degree of medical probability. He also stated that the natural progression of claimant's condition was a factor to be considered. Claimant had a history of injuries, including falling while playing racquetball when he was rendered unconscious, and running at least one marathon which caused his symptoms to increase. Dr. Sankoorikal's records contained no additional mention of work-related injuries.

Claimant was referred by his attorney to board certified orthopedic surgeon Edward J. Prostic, M.D., for an evaluation. Dr. Prostic examined claimant on August 29, 2001, at which time he was advised of the incident of April 1, 1997. Dr. Prostic acknowledged that if claimant had told him of any other work-related aggravations or injuries after April 1, 1997, he would have written those down, but his records indicated no additional aggravations were mentioned. Dr. Prostic also acknowledged that a 90-mile race, which claimant participated in, as well as the marathon and the racquetball playing activities, could all contribute to claimant's ongoing problems. He testified that more than likely it was a combination of stressful physical events, claimant's underlying anatomy and work which led to claimant's ongoing problems. However, the only stressful event he recorded with regard to work was the one on April 1, 1997.

Claimant's medical records were provided by respondent to Dick Geis, M.D., board certified in internal medicine and an independent medical evaluator. Dr. Geis did not have the opportunity to examine claimant, but was provided with extensive medical records detailing claimant's long work and injury history. Dr. Geis acknowledged that in Dr. Sankoorikal's records, there was no mention of a work-related injury, including the April 24, 1997 report from Dr. Arjunan. The medical records indicated claimant began experiencing problems while on vacation, but do not mention claimant's work. Additionally, from May of 1997 through August of 2000, Dr. Sankoorikal's records are void of any reference to any work-related injuries, although they do mention several events, including the Chicago marathon (which claimant ran in October of 1999), the injury while playing racquetball and a fall from his bicycle, all of which could have contributed to claimant's longstanding neck problems. Dr. Geis agreed with Dr. Sankoorikal's opinion that claimant's ongoing problems could not be attributed to claimant's work-related injuries.

In workers compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.¹

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony which may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.²

In this instance, claimant testifies to a specific event occurring on April 1, 1997, when he hit himself on the head while putting on a 40- to 45-pound air pack. Claimant's testimony, while questioned by some medical records, is not sufficiently contradicted for the Board to reject claimant's allegation that he suffered an accidental injury on that date. The Board finds, as did the ALJ, that claimant did suffer accidental injury arising out of and in the course of his employment on April 1, 1997.

Claimant, however, alleges an ongoing series of injuries from his work activities thereafter. The medical reports do not support claimant's contention that he suffered a series of injuries. There is no indication from Dr. Sankoorikal's records from May of 1997 through August of 2000 that claimant was suffering additional work-related injuries. None of the health care providers who testified in this matter were able to testify within a reasonable degree of medical probability or certainty that claimant's work activities after April 1, 1997, aggravated his condition. Instead, there are numerous examples of claimant's non-work activities, including marathon races, racquetball playing and bicycle wrecks, all of which potentially contributed to claimant's continuing deteriorating cervical problems. The Board, therefore, finds claimant has failed to prove that he suffered accidental injury through a series of accidents from April 1, 1997, forward. Therefore, all time limits associated with this workers compensation claim will utilize the April 1, 1997 date of accident.

(b) No proceeding for compensation shall be maintained under the workers compensation act unless an application for a hearing is on file in the office of the director within three years of the date of accident or within two years of the date of the last payment of compensation, whichever is later.³

The ALJ determined, and the Board agrees, that claimant failed to prove that an application for hearing was filed within three years of the date of accident or within

¹ K.S.A. 1996 Supp. 44-501 and K.S.A. 1996 Supp. 44-508(g).

² *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

³ K.S.A. 44-534 (Furse 1993).

two years of the last providing of medical treatment. The application in this matter was filed March 8, 2001, for an April 1, 1997 accident. Additionally, there is no evidence in the record regarding when medical treatment was provided and if that medical treatment was authorized by respondent. The Board, therefore, finds pursuant to K.S.A. 44-534 (Furse 1993) that claimant has failed to prove he filed a timely application for hearing and claimant's workers compensation claim should, therefore, be dismissed.

Claimant alleges that he was misled by respondent's representatives, arguing that they promised he would be provided medical care in the future. However, claimant's arguments are defeated by the medical records, which fail to display any allegation by claimant to his health care providers of a work-related connection to his ongoing symptoms. If claimant were indeed contending that this was a work-related injury and that he was making a claim for workers compensation benefits and that he had, in some way, been misled to believe that he had satisfied the statutes of limitation in workers compensation matters, there would be some mention in the medical records of claimant's contention that his alleged ongoing problems were related to his job. That evidence does not exist in this record.

The Board acknowledges that workers compensation law in Kansas has long employed equitable estoppel to prevent litigants from maintaining inconsistent positions concerning transactions that end in litigation.⁴

The doctrine of equitable estoppel is based upon the principle that a person is held to a representation made or a position assumed where otherwise inequitable consequences would result to another who, having the right to do so under all the circumstances, has in good faith relied thereon.⁵

The doctrine of equitable estoppel requires consistency of conduct, and a litigant is estopped and precluded from maintaining an attitude with reference to a transaction involved wholly inconsistent with his previous acts and business connection with such transaction.⁶

One who asserts an estoppel must show some change in position in reliance on the adversary's misleading statement. . . .⁷

⁴ *Marley v. M. Bruenger & Co., Inc.*, 27 Kan. App. 2d 501, 6 P.3d 421 (2000).

⁵ *Maurer v. J. C. Nichols Co.*, 207 Kan. 315, Syl. ¶ 3, 485 P.2d 174 (1971).

⁶ *Browning v. Lefevre*, 191 Kan. 397, Syl. ¶ 2, 381 P.2d 524 (1963).

⁷ *In re Morgan*, 219 Kan.136, 137, 546 P.2d 1394 (1976).

Claimant alleges equitable estoppel to overcome the fact that he did not timely file his application for hearing in this matter, yet fails to provide any evidence to show that he suffered an ongoing series of injuries during his employment with respondent. Had there been some indication in the medical records that claimant contended he was suffering ongoing injuries, perhaps claimant's argument would have been more meritorious. The Board fails to find that claimant changed his position as a result of any alleged promises made by any representatives of respondent. The Board, therefore, determines that equitable estoppel should not be applied in this matter.

The Board, therefore, finds that the Award of the ALJ denying claimant benefits resulting from his failure to timely file application for hearing in this matter should be, and is hereby, affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Brad E. Avery dated February 16, 2004, should be, and is hereby, affirmed and claimant is denied benefits in this matter under the Workers Compensation Act.

IT IS SO ORDERED.

Dated this ____ day of October 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Seth G. Valerius, Attorney for Claimant
Jeff K. Cooper, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director